No. 17-532

# In The Supreme Court of the United States

CLAYVIN HERRERA,

*Petitioner,*

v.

STATE OF WYOMING,

*Respondent.*

**On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County**

## BRIEF FOR RESPONDENT


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## INTRODUCTION

Twenty-five years ago, the Crow Tribe sued Wyoming officials to prohibit enforcement of Wyoming hunting and fishing laws against tribal members. The Tribe lost. The Tenth Circuit Court of Appeals interpreted the 1868 Treaty with the Crows and ruled that "the Tribe and its members are subject to the game laws of Wyoming." *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 994 (10th Cir. 1995).

When Wyoming prosecuted Herrera for killing a trophy bull elk without a license, however, Herrera argued that, despite *Repsis*, he was immune from prosecution as a member of the Crow Tribe. This Court should not reward Herrera's collateral attack by reinterpreting the Crow Treaty.

"One of the law's very objects is the finality of its judgments." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). After the appeals are over, the losing party must accept the court's answer. To protect against parties who refuse to respect final judgments, this Court imposes *res judicata*—either claim preclusion or issue preclusion—as a matter of federal common law. Litigants cannot return to court again and again seeking a different outcome.

Herrera presents several arguments as to why this Court should ignore the *Repsis* final judgment and reinterpret the Crow Treaty, but his claimed exceptions to finality are far broader than anything this Court has adopted. Moreover, because the preclusive effect of federal judgments—like the

decision in *Repsis*—is federal common law, a decision to reach the merits in this case will hearten losing parties across all areas of substantive law. This Court should decline to resolve the question presented entirely and affirm the Wyoming courts.

If this Court recognizes an exception to preclusion and decides the merits, it should affirm Herrera's conviction. Of the hundreds of Indian treaties negotiated by the United States, only two have the identical language presented here.[1] For both treaties, the courts have held that the off-reservation hunting right has expired.

The first decision was by this Court. In *Ward v. Race Horse*, this Court held that Congress intended the off-reservation hunting right in the Shoshone-Bannock Treaty to expire when Wyoming became a state. 163 U.S. 504 (1896). In 1999, this Court affirmed that holding. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

The second case was the Tenth Circuit's decision in *Repsis*, which held that the Crow Tribe's off-reservation hunting right has expired. Wyoming and its citizens have relied upon these interpretations, and the decisions are correct as a matter of law. Herrera's

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[1] Two months after signing the Treaty with the Crows, the United States, the Eastern Band of Shoshone, and the Bannock Tribe of Indians agreed to the Shoshone-Bannock Treaty. Except for reservation descriptions and payments, articles 1-12 of the two treaties are identical. *Compare* Treaty with the Eastern Band of Shoshonees and Bannacks, 15 Stat. 673 (1869), *with* Treaty with the Crows, 15 Stat. 649 (1868).

new interpretation disregards the text, the historical context, and the implementation of the Crow Treaty. The off-reservation hunting right has expired, and this Court should affirm his conviction.

## STATEMENT OF THE CASE

In January 2014, Herrera and three companions climbed over a fence into Wyoming and killed four bull elk. When caught months later, Herrera asserted a tribal right to hunt in Wyoming, but the Wyoming courts rejected his claimed immunity because of more than 100 years of history and case law.

To interpret tribal treaty rights, this Court looks to "the larger context that frames the Treaty." *Mille Lacs*, 526 U.S. at 196. Wyoming offered this information to the trial court. (JA235). Herrera said an evidentiary hearing was unnecessary, (R.905), and the trial court dismissed the scheduled hearing when it ruled Herrera's treaty defense was unavailable. (Pet.App.43). The record before the Court therefore lacks required evidence about "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Mille Lacs*, 526 U.S. at 196. Wyoming has attempted to use public documents, to the extent feasible, to provide this information.

### A. The Fort Laramie Treaty of 1851

In 1851, the United States sought to protect settlers traveling the Oregon Trail. At the time, all of northern Wyoming was Indian Territory under the control of the War Department and subject to the restrictions of the Indian Intercourse Act of 1834. Regulation of Trade and Intercourse with the Indian Tribes, ch. 161, 4 Stat. 729 (1834); Bruce Blevins, *Mapping Wyoming* 9 (2007).

"[G]old had recently been discovered in California. Increasing numbers of people journeying westward were crossing the lands of the Indians. Buffalo and other game fell prey to the travelers' need for food (and sometimes their need for sport)." *Crow Tribe of Indians v. United States*, 284 F.2d 361, 364 (Ct. Cl. 1960). "The Indians resented these inroads, and their resistance often made the westward journey a perilous one." *Id.*

The Fort Laramie Treaty sought "to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians." *Montana v. United States*, 450 U.S. 544, 557-58 (1981) (*Montana II*). The 1851 Treaty did not "create a reservation" for any of the signatory tribes under the laws of the United States. *Id.* Rather, the Treaty subdivided Indian Territory (part of which would become Wyoming) into hunting districts "to establish, as between the

United States and the various signatory tribes, the boundaries of the lands of the tribes." *Crow Tribe*, 284 F.2d at 367.

### B. The 1868 Treaty with the Crows

Right of safe passage to the Pacific was sufficient only if settlers traveled onward. Within a year after the discovery of gold in Montana, the Bozeman Trail brought so many outsiders that the agent for the Crow Tribe reported non-Indians "are now overrunning their whole country." Frederick Hoxie, *Parading through history: The making of the Crow nation in America, 1805–1935* 88 (1995).

At the same time, Indian policy in the United States evolved toward reservations in order to "restrict the limits of all the Indian tribes upon our frontiers, and cause them to be settled in fixed and permanent localities, thereafter not to be disturbed." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], Lexis (database updated July 2017) (quoting Commissioner of Indian Affairs George Manypenny).

In November 1867, with the Sioux Indians attacking settlers along the Bozeman Trail, representatives of the Crow Tribe met members of the Great Peace Commission. At the meeting, United States officials acknowledged the Tribe's "buffalo and game [were] driven off and [the Tribe's] grass and timber consumed by the opening of roads and the passing of emigrants through [Indian] countries." *Montana II*, 450 U.S. at 571 n.5. The United States offered the

Tribe "homes and cattle, to enable [them] to begin to raise a supply of stock with which to support [their] families when the game was disappeared" in return for permanent settlement on a reservation. Indian Peace Commission, *Proceedings of the Great Peace Commission of 1867 and 1868* 87 (1975).[2]

Like other nomadic Plains tribes, the Crow Indians relied primarily on buffalo for their sustenance. With the looming extermination of this food source, United States officials saw reservation life as the alternative to starvation. "Buffalo are the Indian's bread, but they are going away, and soon will be all gone, and the friends of the Indians want them, by that time, to have something else." *Annual Report of the Commission of Indian Affairs for 1873* at 500 (1873 statement by Felix Brunot to Crow Chief Blackfoot).

Off-reservation hunting rights were temporary measures to gain time. "When the buffalo is gone the Indians will cease to hunt. A few years of peace and the game will have disappeared." *Report of the Indian Peace Commissioners*, H.R. Exec. Doc. 97 at 18 (1868). "In the meantime by the plan suggested we will have formed a

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[2] Herrera quotes from this 1867 meeting to interpret the parties' later agreement. (Pet.Br.6-7). The Crow refused to sign a treaty at the end of the 1867 meeting, however, and Chief Blackfoot specifically rejected the reservation concept. "You speak of putting us on a reservation and teaching us to farm," but "[w]e were not brought up to do that and are not able to do that." *Peace Commission Proceedings* 88. "That talk does not please us." *Id.* Chief Blackfoot's speech at the treaty signing in 1868, acknowledging that the game would soon disappear, marked a change in his opinion and is more relevant to treaty interpretation.

nucleus of civilization among the young that will restrain the old and furnish them a home and subsistence when the game is gone." *Id. See also* Statement of General Hancock, *Peace Commission Proceedings* 14 ("There will soon be no necessity for the Indians to leave their reservations in search of subsistence, for the game will be gone.").

On May 7, 1868, the Crow Tribe and the United States agreed to the Treaty with the Crows. 15 Stat. 649 (1868). At the treaty signing, Chief Blackfoot acknowledged: "We were all raised on wild meat—buffalo, elk, mountain sheep, black-tailed & white-tailed deer. All that is getting scarcer every year. I know it [is] all going to be gone soon." Speech of Chief Blackfoot, Chief of the Crow Indian Tribe, May 6, 1868, in *Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801-69* (Ratified Treaty 370, Documents Relating to the Negotiation of the Treaty of May 7, 1868, with the Crow Indians (available HeinOnline American Indian Law Collection)).

In Article 4 of the Treaty, the Crow agreed to "make said reservation their permanent home," accepting what this Court described in *Race Horse* as a "temporary and precarious" right to hunt off-reservation:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the

> right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

15 Stat. at 650; 163 U.S. at 510.

The Crow Treaty encouraged raising crops and livestock on the reservation, not a continuing nomadic life. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938) (Shoshone-Bannock Treaty, with identical language, evinces "purpose on the part of the United States to help to create an independent permanent farming community upon the reservation").

After 1868, the Tribe understood off-reservation hunting was temporary because the United States expressly said so. In 1873, when Felix Brunot and Chief Blackfoot discussed the Treaty, Brunot said tribal members could travel "across the river, where you go to hunt buffalo . . . while the buffalo are there; but when the game is gone away from there that is all to be white man's land." *Annual Report of the Commissioner of Indian Affairs for 1873* at 494. The off-reservation hunting right meant that "as long as there is peace between the Crows and the whites they may hunt buffalo where there are any and where there are not too many whites." *Id.* at 503.

In the period from 1870-75, "almost six million buffalo were slaughtered, and the species—except for a negligible number of animals which escaped and fled

to the north of the range, some of which crossed the Canadian border—was extinguished." Hans Huth, *Nature and the American: Three Centuries of Changing Attitudes* 163 (2d ed. 1990).

Even on the Crow reservation, game became scarce: "There is no game left upon their reservation at all worth speaking of and we shall have to have a much larger quantity of supplies than have been allowed us for the present fiscal year or the Crows will start to go over the [reservation] line." Hoxie, *Parading* 18 (Letter from Agent Henry Armstrong to Commissioner of Indian Affairs, Sept. 15, 1883). "To Armstrong, either outcome would have been disastrous, for the Montana Territory's burgeoning population resented the tribe's vast reserve of land and would have seized on any off-reservation hunting expeditions as evidence of the Indians' hostile intent." *Id.*

In 1883, the United States Army forced Crow Chief Crazy Head to return to the reservation while on an off-reservation hunt, and the Tribe stopped off-reservation hunting altogether. *See* Hoxie, *Parading* 113-15. Crow lands now "marked the limits of Crow mobility." *Id.* at 115.

While Herrera claims the Crow hunted off-reservation from 1868 through 1989, evidence before the Tenth Circuit in *Repsis* included deposition testimony from Crow officials that the Tribe stopped all off-reservation hunting by 1886. *Repsis* App., Vol. II at 376, 485, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (No. 94-8097). Crow Indians were

prosecuted for poaching in the Bighorn Mountains as early as 1887. Calvin King, *History of Wildlife in the Big Horn Basin of Wyoming* 22 (1992). Indeed, Crows could be jailed for leaving the reservation without the permission of their agent from the 1880s until World War I. Hoxie, *Parading* 183.

"Because the buffalo were now nearly extinct and their Sioux and Piegan enemies were rapidly being replaced by American farmers and ranchers, [the Crow] knew crossing the Yellowstone or traveling south into Wyoming or east to the Powder River country would bring them into a hostile and barren land." Hoxie, *Parading* 122. Elk disappeared from the eastern slope of the Bighorn Mountains by the mid-1880s, and "game in the Big Horn Basin was practically extinct in 1900[.]" King, *History of Wildlife* 17, 19.

In 1884, the United States relocated the Crow Tribe to flatland alongside the Little Bighorn River, marking the Tribe's "confinement within the permanent boundaries of a modern reservation. Before 1884, the tribe could imagine that their life as a hunting people persisted; the founding of Crow Agency marked the beginning of the days after the buffalo had gone away and when other game could not sustain them." Hoxie, *Parading* 15. The Crow "shifted from a migratory hunting subsistence to a pattern of permanent residence in an agricultural community." *Id.* at 184.

### C. *Ward v. Race Horse*

The Shoshone-Bannock Treaty of 1869 was signed two months after the Crow Treaty, and it is the only treaty with language identical to Article 4. 15 Stat. 673 (1869). The Eastern Shoshone and Bannock also understood this off-reservation hunting right was temporary. At a meeting with the Tribes, General Auger acknowledged that "[t]here are a great many white men in your country now, and as soon as the railroad is complete there will be many more." *Peace Commission Proceedings* 151. The United States would set aside land, and "[u]pon this reservation he wishes you to go with all your people as soon as possible, and to make it your permanent home." *Id.* at 152. The Tribes had "permission to hunt wherever you can find game," but "[i]n a few years the game will become scarce and you will not find sufficient to feed your people." *Id.* "You will then have to live in some other way than by hunting and fishing." *Id.* The tribes understood this truth. "I am willing to go upon a reservation, but I want the privilege of hunting the buffalo for a few years. When they are all gone far away we hunt no more; perhaps one year, perhaps two or three years; then we stay on the reservation all the time." *Annual Report of the Commissioner of Indian Affairs for 1868* at 658 (Remarks of Tygee, head chief of the Bannock).

In 1895, non-Indians killed three Bannock Indians and arrested others while the Indians were hunting in Jackson Hole, Wyoming. The State argued that the Indians had violated Wyoming game laws and were

killing animals indiscriminately, not for sustenance, but to sell their hides in trade. *See* 28 Cong. Rec. 6230-39 (1895-96) (statement of Del. Mondell). Both the United States and Wyoming agreed the dispute should be settled in court. *Annual Report of the Commissioner of Indian Affairs for 1896* at 58.

Wyoming charged two Bannock Indians with poaching, and the United States Attorney sought a writ of habeas corpus. *Id.* at 59. The lower court ruled Wyoming game laws were pre-empted by the Article 4 hunting right. *In re Race Horse*, 70 F. 598, 613 (Cir. Ct. D. Wyo. 1895).

On appeal, this Court reversed. *Ward v. Race Horse*, 163 U.S. 504 (1896). It held that the term "unoccupied lands of the United States" did not include "all such lands of the United States wherever situated, but only lands of that character embraced within what the treaty denominates as hunting districts." *Id.* at 508. "Hunting districts" were not simply "places where game was to be found," but were territory "beyond the borders of the white settlements." *Id.* at 508. "[T]he march of advancing civilization foreshadowed the fact that the wilderness, which lay on all sides of the point selected for the reservation, was destined to be occupied and settled[.]" *Id.* at 508-09.

The Treaty did not allow a tribal member to "seek out every portion of unoccupied government land and there exercise the right of hunting" because the "very object" of the Treaty was "[c]onfining him to the reservation" so his "tribal relations might be enjoyed

under the shelter of the United States" and away from "the new settlements as they advanced." *Id.* at 509. The right to hunt diminished "naturally . . . from the advance of the white settlements in the hunting districts to which the treaty referred" and when the land around the reservation "ceased to be a part of the hunting districts and came within the authority and jurisdiction of a State," the hunting right disappeared altogether. *Id.* at 510. Although Congress had the power to create treaty rights "which are of such a nature as to imply their perpetuity," the Shoshone-Bannock Treaty created only a "temporary and precarious" right, "essentially perishable, and intended to be of a limited duration" that expired upon Wyoming statehood. *Id.* at 515.

The *Race Horse* Court also held that the hunting right was incompatible with the Act admitting Wyoming into the Union under the equal footing doctrine. *Id.* at 514.

### D. *Crow Tribe v. Repsis*

Citing a treaty right to hunt on the "unoccupied lands of the United States," the Crow Tribe sued Wyoming in federal court in 1992, seeking to prohibit Wyoming officials from enforcing state game laws against its tribal members. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). The Tribe sued on its behalf and on "behalf of its members, namely members of the Crow Tribe." Amended Complaint, ¶ 2 (JA258).

The district court granted summary judgment to Wyoming. *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994). On appeal before the Tenth Circuit, the Crow Tribe distinguished *Race Horse* in the same way Herrera does now. The Tribe argued this Court had overruled, repudiated, and disclaimed every legal doctrine underlying *Race Horse*, especially the equal footing doctrine. *Repsis*, 73 F.3d at 988. *See also* Brief of Appellant at 16-21, *Repsis*, 73 F.3d 982 (No. 94-8097) (arguing that this Court: (1) "has expressly overruled the fiction of state 'ownership' of wild game[;]" (2) "rejected use of the Equal Footing Doctrine in the field of state regulation and jurisdiction over Indian treaty rights[;]" (3) declared "there is no irreconcilable conflict between the state power to regulate and the exercise of federal authority as mistakenly supposed in *Race Horse*[;]" and (4) "reversed" "the rules of treaty construction employed in *Race Horse*[;]" so therefore "there is nothing left of either the reasoning or the holding in *Race Horse*"). The Tribe asserted the equal footing doctrine was a "major premise" of the *Race Horse* decision despite this Court's repudiation of that doctrine as a limit on Indian treaty rights less than ten years later. *Repsis*, 73 F.3d at 990; *see also United States v. Winans*, 198 U.S. 371, 384 (1905).

The Tenth Circuit agreed that the equal footing doctrine "does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union." *Repsis*, 73 F.3d at 991. But it held the 1868 Treaty did not convey such a right: "the privilege given was temporary and

precarious." *Id.* at 992. The Tenth Circuit held that because the Crow Treaty is identical to the Shoshone-Bannock Treaty construed in *Race Horse*, and because *Race Horse* held the hunting right expired when the hunting districts disappeared at Wyoming statehood, the Crow Tribe's off-reservation hunting right also had expired. *Id.* at 988-89 (citing *Race Horse*, 163 U.S. at 510).

The Tenth Circuit did not hold that the off-reservation hunting right was abrogated, as Herrera argues. (Pet.Br.19-32). Rather, the Court held the Treaty itself "does not give [the Tribe] the right to exercise this privilege within the limits of [Wyoming] in violation of its laws." *Repsis*, 73 F.3d at 989.

The Tenth Circuit adopted two additional rationales for applying Wyoming game laws to tribal members. The court held the creation of the Bighorn National Forest meant the land was no longer "unoccupied" within the meaning of the 1868 Treaty. *Id.* at 993. Wyoming made this argument in its brief to the District Court and on appeal. Brief of Appellee at 20-29, *Repsis*, 73 F.3d 982 (No. 94-8097); Brief of Defendants, *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1995) (No. 92-CV-1002) found in *Repsis* App., Vol. II at 381-82. Reviewing the record below, the Tenth Circuit also held that "ample evidence" supported a ruling that Wyoming's restrictions on elk hunting were reasonable and necessary for conservation. *Id.* at 992-93.

### E. *Minnesota v. Mille Lacs Band of Indians*

Four years after *Repsis*, in 1999, this Court ruled that Minnesota statehood did not abrogate, by implication, the Mille Lacs Band of Chippewa Indians' 1837 treaty right to hunt, fish, and gather wild rice. *Mille Lacs*, 526 U.S. at 208. *Mille Lacs* confirmed what *Repsis* had anticipated: the equal footing doctrine has not been a basis for terminating Indian treaty rights since 1905. *Compare id.* at 205 n.7 (citing *Winans*, 198 U.S. at 382-84), *with Repsis*, 73 F.3d at 991 (also citing *Winans*). The *Mille Lacs* Court held the relevant inquiry is whether Congress intended Indian treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event. *Id.* at 206-07. "The Court did not, however, overrule the outcome in *Race Horse*, but rather preserved the ruling that the specific rights reserved in the Shoshone-Bannock treaty were intended to terminate upon statehood." *Cohen's Handbook*, § 18.04[2][e] n.60.

> The equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The Treaty rights at issue were not intended to survive Wyoming's statehood. We acknowledged that Congress, in the exercise of its authority over territorial lands, has the power to secure off-reservation usufructuary rights to Indian Tribes through a treaty, and that "it would be also within the power of Congress to continue them in the State, on its admission into the Union." *Race Horse*, 163 U.S. at 515. We also acknowledged that if Congress intended the

> rights to survive statehood, there was no need for Congress to preserve those rights explicitly in the statehood Act. We concluded, however, that the particular rights in the treaty at issue there—"the right to hunt on the unoccupied lands of the United States"—were not intended to survive statehood. 163 U.S. at 514; *see* 163 U.S. at 514-15.

*Mille Lacs*, 526 U.S. at 206.

**F. Herrera's conviction**

In January 2014, Herrera traveled to the Montana-Wyoming border, crossed the fence built by the federal lessee who grazes cattle in the national forest there, and hiked three-quarters of a mile into Wyoming. (JA54,68-70,74-75). After spotting several bull elk, Herrera and his companions killed four. (JA54-55,185-86). In the Bighorn Mountains, the last day to hunt trophy bull elk was November 5, 2013, two months earlier. (R.581-90). Wyoming bans all elk hunting in the Bighorn Mountains from January until September so animals can survive the winter and raise young. (R.835-42).

A few days after killing the elk, Herrera emailed the Wyoming Game and Fish Department, stating he was a tribal game warden and offering to "help in any way we can to catch violators near our mutual borders." (JA241). Wyoming Game Warden Dustin Shorma met Herrera, and Herrera asked about Wyoming's forensic investigation capabilities. (JA30-34). Shorma later found a recent photograph on the

internet of Herrera displaying a bull elk, captioned "Good Year on the Crow Reservation." (JA34,38,242). Looking at the landscape, Shorma believed the photograph was taken in Wyoming. (JA43).[3]

After the snow melted in summer 2014, Shorma found four elk carcasses—three headless—just south of the Crow Reservation. (JA54-55). The location matched Herrera's photograph exactly. (JA52-62). Working with the Crow Tribe, Shorma cited Herrera, who handed over a mounted elk head that matched the DNA of one of the carcasses. (JA117,120-21,125-26,237).

Wyoming charged Herrera with (1) killing an antlered big game animal without a license or during a closed season and (2) helping others do the same. (Pet.App.5). Herrera moved to dismiss the charges, arguing his tribal membership allowed him to hunt the "unoccupied lands of the United States" regardless of Wyoming law. (R.368). The trial court denied his motion. (Pet.App.36-43). A jury convicted Herrera, and the judge sentenced him to probation and a fine. (R.1468-69). Herrera appealed to the Wyoming district court, which affirmed his conviction and sentence.

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[3] Before this Court, Herrera suggests he killed the elk for food to survive the winter, but Herrera did not raise a necessity defense below. (Pet.Br.13-14). If he had, Herrera would have had to explain why he left an entire elk to rot in the field, left meat on the other three elk, and hiked out with three elk heads as trophies, including the one in the photograph Herrera posted on monstermuleys.com (a website where hunters compare the size of their trophy kills). (JA34,38,52-53,55-57,231,240).

(Pet.App.3-35). The Wyoming Supreme Court denied certiorari. (Pet.App.1-2).

## SUMMARY OF ARGUMENT

The Crow Tribe and Wyoming have already litigated the exact issue presented here. The Tenth Circuit ruled the Tribe and its members must obey Wyoming law. Herrera argues that final judgment does not prevent him from arguing the Tenth Circuit was wrong, but this Court should enforce the preclusive effect of *Repsis* and affirm Herrera's conviction.

As an initial matter, *Repsis* precludes Herrera from relitigating the Crow Treaty because all of the elements of issue preclusion are met. The question presented here is identical to the question resolved by the Tenth Circuit. The Crow Tribe litigated whether Article 4 of the Crow Treaty prevented Wyoming from prosecuting tribal members for hunting in the Bighorn National Forest. The Tenth Circuit interpreted Article 4 as a necessary part of its final determination. Because Herrera is in privity with his Tribe, he is bound by the result even though he was not personally named. The Crow Tribe had a full and fair opportunity to litigate its treaty rights and, as the plaintiff, had every incentive to forcefully press its arguments in the lawsuit it brought against Wyoming officials in federal court.

Herrera cannot avoid preclusion by arguing that the law has changed. *Mille Lacs* did not overrule *Race Horse*; it affirmed that "the right to hunt on the unoccupied lands of the United States" was not intended to survive Wyoming's statehood. 526 U.S. at 206. Moreover, this Court has never adopted the suggestion in the Restatement (Second) of Judgments that a change in law, by itself, should relax preclusion, and this is not the case for the Court to do so. Finally, because Herrera's treaty defense was an affirmative defense rather than an element of a charged crime, there is no fundamental unfairness or constitutional due process implication in applying the *Repsis* judgment to bar Herrera from relitigating the Treaty's meaning.

If this Court allows Herrera to relitigate his tribal treaty defense, it should still affirm Herrera's conviction. *Race Horse* was correct: Article 4 was a temporary right not intended to survive Wyoming's statehood. As the history and conduct of the parties establishes, Article 4 allowed the Crow Tribe—a tribe of Plains Indians who survived by hunting buffalo—to hunt on public domain lands to provide for its members. The parties intended, however, that this right continue only until tribal members could learn to cultivate the soil and provide for themselves within the confines of the reservation. Once the advance of civilization reached Crow reservation boundaries, the wilderness that had once surrounded the reservation disappeared and the land became occupied. Wyoming statehood was not just a legal event, it was a

recognition the once wild frontier was no more. And the Crow Tribe understood that its hunting right had ended. The Tribe stopped hunting off-reservation in 1886, as the history and the record in *Repsis* show.

If this Court concludes that Herrera retains the right to hunt off-reservation in the "unoccupied lands of the United States," his conviction should still be affirmed. Creation of the Bighorn National Forest was an act of occupation, placing that land outside of the ambit of the Crow Treaty right. Moreover, the federal government's control over the forest has a second effect. Federal regulations require Herrera to comply with Wyoming law before hunting in the national forest. He did not do so.

## ARGUMENT

### I. The Tenth Circuit's ruling in *Repsis* binds Herrera, and he cannot use this case to collaterally attack that final judgment.

The Crow Tribe and Wyoming have litigated the exact question presented here to final judgment, and the Tenth Circuit ruled that "the Tribe and its members are subject to the game laws of Wyoming." *Repsis*, 73 F.3d at 994; Amended Complaint (JA257-67).

Herrera cannot distance himself from the *Repsis* final judgment.[4] Under the general rules of issue preclusion, the analysis is not difficult. The only significant question is whether Herrera himself is bound by his Tribe's prior loss, and the Court's case law on the nature of tribal sovereignty says that he is.

Moreover, Herrera cannot avoid preclusion by arguing that the underlying law has changed. The *Mille Lacs* Court expressly preserved the "alternative holding" of *Race Horse* upon which the Tenth Circuit relied in *Repsis*. In addition, this Court has never adopted the Second Restatement of Judgments' broad exception for a "change in the applicable law" as Herrera proposes. It should not do so here. Finally, Herrera claims that because he is a criminal defendant, preclusion should not apply to him. But Herrera's claim of a tribal right was an affirmative defense, not an element of the crime, so the state court properly applied *Repsis* to bar his argument.

### A. The *Repsis* decision binds Herrera and precludes him from asserting an off-reservation hunting right against Wyoming.

The preclusive effect of *Repsis* is a matter of federal common law. *Semtek Int'l Inc. v. Lockheed*

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[4] Although Herrera did not raise preclusion in his question presented, this threshold question dictates affirmance of his conviction, and Wyoming preserved the issue in its Brief in Opposition to a Writ of Certiorari. Sup.Ct.R.15.2.

*Martin Corp.*, 531 U.S. 497, 507-08 (2001). This Court has held that "once an issue is [1] actually and necessarily determined [2] by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving [3] a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979) (*Montana I*).

Each element of issue preclusion is met here. First, the matter was actually and necessarily determined. In *Repsis*, the Tenth Circuit ruled that tribal members must comply with Wyoming's game laws. The court did so after the Tribe sought a declaration that tribal members "retain their treaty-reserved, off-reservation hunting and fishing rights on ceded, unoccupied, and public lands, and that such rights preclude state regulation." Complaint at Prayer for Relief (b) (JA265). The *Repsis* judgment not only actually resolved whether the members of the Crow Tribe are subject to Wyoming law, but the Tribe's Complaint that initiated the case demonstrates that the court necessarily did so.

Second, no party contests that the federal courts are courts of competent jurisdiction to interpret Indian treaties. *United States v. Thomas*, 151 U.S. 577, 585-86 (1894).

Finally, while Herrera was not a "party" in *Repsis*, his membership in the Crow Tribe binds him to the *Repsis* interpretation of the Tribe's off-reservation hunting right. Herrera argues that he cannot be bound because he was "all of ten years old" when *Repsis*

was decided. (Pet.Br.55). While non-parties are not generally bound by litigation, this Court recognizes "an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (citation omitted). As one exception, preclusion can arise from a "pre-existing 'substantive legal relationship.'" *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

The relationship of the Crow Tribe to Herrera is such a relationship. In *Repsis*, the Tribe sued "in its own behalf and in behalf of its members" as the "successor in interest to the Crow Tribe who was a party to the Fort Laramie Treaties of 1851 and 1868." Complaint ¶ 2 (JA258).

The Crow Tribe is "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *United States v. Lara*, 541 U.S. 193, 205 (2004) (citation omitted). The fact of the Crow Treaty itself is recognition of the Tribe's authority to reach "an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties." *Cherokee Nation v. Georgia*, 30 U.S. 1, 60 (1831). If the Court denies the Tribe's ability to bind its members, this Court diminishes an "attribute[] of sovereignty," making the Tribe more like a "private, voluntary organization[]." *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

Having brought a dispute to the courts, the Crow Tribe and its members must respect the final judgment. Like other litigants, when a sovereign submits a dispute to the federal courts for resolution, the result binds the sovereign. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984). And when a sovereign is bound by a judgment, the judgment also binds its citizens. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938); *Moses v. Dep't of Corr.*, 736 N.W.2d 269, 283 (Mich. Ct. App. 2007) ("Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, [the court] find[s] that the requisite privity exists to apply the doctrine of collateral estoppel in this case.").

When this Court denied the Tribe's petition for a writ of certiorari in *Repsis* in 1996, the appeals were over. The judgment in *Repsis* became final. Herrera cannot both claim a tribal treaty right and simultaneously evade the final judgment that interprets that same right when that final judgment binds his tribe.

### B. Herrera cannot evade issue preclusion by pointing to a change in law.

Herrera argues that this Court can ignore *Repsis* because the Tenth Circuit relied, in part, upon *Race Horse*, and *Mille Lacs* "thoroughly repudiated" *Race Horse*, and therefore "plainly changed the legal context" underlying *Repsis*. (Pet.Br.28&20).

Herrera is incorrect for two reasons. First, Herrera's interpretation of *Mille Lacs* is flatly inconsistent with that opinion. Second, the exception he identifies—comment c to § 28 of the Restatement (Second) of Judgments, which says that a change in law eliminates issue preclusion—is far broader than any exception adopted by this Court. Indeed, Herrera's formulation is broader even than the Restatement comment. This Court should not adopt this exception here.

### 1. *Mille Lacs* intentionally preserved the interpretation of the specific treaty language in *Race Horse*, so Herrera cannot argue that *Mille Lacs* undermined earlier decisions that relied upon that holding.

Wyoming does not dispute that this Court has rejected the doctrine of "equal footing" mentioned in *Race Horse* as resting "on a false premise" that Indian hunting rights are irreconcilable with state sovereignty. *Mille Lacs*, 526 U.S. at 204. Herrera argues that this case is about the "equal footing" doctrine, but Wyoming never relied upon this doctrine in the state courts below, and the Tenth Circuit did not rely on this doctrine in 1995 when it held that the Crow Tribe is subject to Wyoming game laws. Herrera's arguments about the equal footing doctrine and treaty "abrogation" are red herrings. He seeks to reverse his conviction based on reasons the state courts never adopted.

The equal footing doctrine "was only part of the holding" in *Race Horse*. *Mille Lacs*, 526 U.S. at 206. *Mille Lacs* re-affirmed what it said was *Race Horse*'s "alternative holding." *Id.* The *Race Horse* hunting rights—which are identical to the Crow Tribe's rights—had a "fixed termination point," and Congress "clearly contemplated" when it ratified the Treaty that "the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* at 207. "[T]he particular rights in the treaty at issue there—'the right to hunt on the unoccupied lands of the United States'—were not intended to survive statehood." *Id.*

Both *Repsis* courts had identified and followed this alternative holding before *Mille Lacs* expressly approved of it. The *Repsis* district court held that "the underlying fact pattern, including the treaty language at issue" in the Crow Treaty "precisely matches" the treaty in *Race Horse*, and lower courts "must follow the controlling decision." *Repsis*, 866 F. Supp. at 524. Similarly, the Tenth Circuit relied upon *Race Horse*'s determination that "it was the intent of Congress to repeal the right to hunt upon Wyoming's admission to the Union." *Repsis*, 73 F.3d at 991.

Only the *Mille Lacs* dissent argued that *Mille Lacs* "overruled" *Race Horse*. 524 U.S. at 220 (Rehnquist, C.J., dissenting). The Court majority, which of course was the master of its own holding, responded by explaining that not all "temporary and precarious" hunting rights expired upon statehood; however, some did, specifically the right in Article 4 of the

Shoshone-Bannock Treaty. Therefore, the Court stated, the dissent's contention in *Mille Lacs* that it had reversed *Race Horse sub silentio*—with the effect of resurrecting the Shoshone-Bannock (and Crow) Article 4 off-reservation hunting right—was incorrect.

The *Mille Lacs* Court merely held that statehood did not *automatically* extinguish tribal hunting rights which, like the Mille Lacs right, could be terminated through other means. The Court reasoned that a categorical rule based solely on whether the rights could expire in the future for any reason was "too broad to be useful as a guide to whether treaty rights were intended to survive statehood." 526 U.S. at 207. This holding did not prevent the *Mille Lacs* majority from explaining that in the particular case of the Shoshone-Bannock Treaty, statehood had indeed marked the expiration of the off-reservation hunting right. Thus, the *Race Horse* decision survived *Mille Lacs*, contrary to Herrera's reliance on the dissent's characterization.

Moreover, this Court should note the irony of Herrera's embrace of the *Mille Lacs* dissent. The dissent believed the Tribe's off-reservation hunting right had expired upon Minnesota statehood, differences between that 1837 treaty and the Shoshone-Bannock Treaty of 1869 notwithstanding. Properly understood, the views in *Mille Lacs* were: a five justice majority endorsing *Race Horse* on a narrow alternative holding, and a four justice dissent endorsing *Race Horse* on the broader basis that statehood necessarily extinguished the treaty right. *Race Horse*, at least as applied to the specific language

of Article 4 of the Shoshone-Bannock and Crow Treaties, emerged from *Mille Lacs* with the approval of a unanimous Court.

As one further irony, in its brief to this Court in *Mille Lacs*, the United States assured this Court that it could uphold the Mille Lacs Tribe's hunting right without overruling *Race Horse*'s contrary interpretation of a similar, but not identical, provision in the Shoshone-Bannock Treaty. The Mille Lacs majority expressly obliged. Now, the United States asserts that *Mille Lacs* constitutes a sufficiently tectonic shift in the legal landscape to overcome the preclusive effect of *Race Horse* and *Repsis*. This is just the sort of unfair incrementalism that this Court would invite if it endorses Herrera's fuzzy exception to finality.

This Court's decision in *Mille Lacs* to preserve *Race Horse*'s "alternative holding" provides clear direction. This Court does not permit "other courts [to] conclude [that] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Race Horse* therefore has direct application for the Shoshone-Bannock Treaty and the one other Treaty negotiated at the same time with identical language: the Treaty with the Crows.[5]

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[5] It is unsurprising that the courts have not applied *Race Horse* since *Mille Lacs*. (United States Br. at 20-21). Article 4 has been interpreted with a final judgment for the only two treaties in which it appears.

Herrera's argument, then, cannot plausibly be that *Mille Lacs* changed the applicable legal context. His actual argument is that this Court should *change the law* to excuse issue preclusion. This cannot happen. "A system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015) (Gorsuch, J.) (*Ute VI*).

### 2. This Court allows a "change in the applicable legal context" to defeat issue preclusion only in limited circumstances, and Herrera's interpretation of this exception would be a dramatic expansion.

Herrera argues that a "change in the applicable legal context" defeats issue preclusion. (Pet.Br.46-48) (citing *Bobby v. Bies*, 556 U.S. 825, 834 (2009)). The Court's opinion in *Bies* cites to a comment from the Second Restatement of Judgments that "an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties." Restatement (Second) of Judgments § 28 cmt. c (Am. Law Inst. 1982). This Court's brief reference in *Bies* to the Restatement should not be understood to revise the federal common law of issue preclusion, and the Court should not enshrine the Restatement's approach here.

This Court's longstanding case law on issue preclusion is considerably more protective of finality than the Restatement. Under this Court's opinions, litigants can escape issue preclusion only "for 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana I*, 440 U.S. at 162. "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *Id.* (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)) (emphasis by the Court). "But *a fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Id.* (emphasis by the Court).[6]

Herrera's case does not fit this exception. As the Wyoming district court noted below, "the determination of the validity of the off-reservation treaty right is a mixed question of law and fact, and it involves the application of the same principles of law to historic facts that were complete by the time of the first adjudication" in *Repsis*. (Pet.App.25). The Crow Tribe's off-reservation hunting right was a "right distinctly adjudged" in *Repsis*, and "that right cannot be disputed

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[6] *Montana I* does suggest preclusion might be relaxed for "parties with an ongoing interest in constitutional issues" when preclusion would "freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana I*, 440 U.S. at 162-63. This is not a constitutional case.

in the present action, even if the determination was reached through an erroneous application of the law." (Pet.App.26) (following *Moser*, 266 U.S. at 242).

Moreover, nothing in *Bobby v. Bies* indicates that this Court's citation of the Restatement represented its adoption of the Restatement's broad exemption as a matter of federal common law. *Bies* did not cite *Montana I* or other case law. *Bies* dealt with issue preclusion as embodied in the Double Jeopardy Clause, not the concept of issue preclusion that applies to all federal decisions as a matter of federal common law. *But see Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion) (distinguishing Double Jeopardy Clause from modern civil preclusion principles).[7]

This exception from preclusion is narrow for good reason. The Restatement's broad exception encourages unhappy litigants to move into a state court and try again.

Litigants are bound by lower federal court decisions, but state courts are not bound by the lower

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[7] In *Bies*, Ohio had conceded in an earlier proceeding that the jury could consider Bies's mental impairment as a mitigating factor against capital punishment; the concession did not preclude Ohio from arguing Bies could still be executed after this Court held that the Eighth Amendment bars execution of mentally impaired offenders. 556 U.S. at 827-28. *Bies* held the elements of issue preclusion were not met, but even if they were, preclusion was inappropriate because an Eighth Amendment challenge presents a discrete issue, and "the change in law substantially altered" the State's incentive to contest mental impairment in the earlier proceeding. *Id.* at 836-37.

federal courts' interpretations of law. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 620 (1989). Only preclusion protects against a second try in state court. Under Herrera's approach, litigants can "disregard the binding effect" of the first loss and "attempt to relitigate . . . in a friendlier forum" whenever they can argue that something—a precedent or a principle—has somehow been undermined by this Court. *Ute VI*, 790 F.3d at 1003. If the stubborn litigant wins on the second try, then he creates a split in authority for this Court to address. If the second court catches on and imposes preclusion, that is of no moment. Review by this Court, for Herrera, not only evaluates whether there has been a "change in the applicable legal context" but also allows a potential victory on the merits even though the first judgment was final long ago.

This cannot be the law. Protective of its own authority, this Court demands that even when its precedents have "wobbly, moth-eaten foundations," lower courts must faithfully apply them to decide newly-filed cases with *different parties*, for whom relief is only possible through a grant of certiorari. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The Restatement's approach is the opposite, encouraging the *same parties* to argue ceaselessly about the evolution of this Court's case law and leaving the question of whether to follow this Court's precedents to lower courts.

Herrera's approach is especially destructive of finality when the dispute involves sovereigns without natural lives, who can wait much longer for a shift in

this Court's jurisprudence. *Repsis* "was resolved nearly twenty years ago, the Supreme Court declined to disturb its judgment, and the time has long since come for the parties to accept it." *Ute VI*, 790 F.3d at 1012. This Court should not relax its longstanding rules on issue preclusion for Herrera.

### C. No other exception permits Herrera to escape issue preclusion in this case.

#### 1. Issue preclusion still applies to Herrera even though he is a criminal defendant.

Herrera argues issue preclusion is constitutionally dubious in the criminal context. (Pet.Br.56-57). He cites no rule directly on point, and the cases he identifies are irrelevant.

Herrera's cases about preclusion in the criminal context all involve using the doctrine to establish or refute elements of the charged crimes. (Pet.Br.56-57). Wyoming did not convict Herrera after an earlier jury had decided "an issue of ultimate fact" and acquitted him. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *United States v. Harnage*, 976 F.2d 633, 634 (11th Cir. 1992) (precluding relitigation of "evidentiary facts"). A prior guilty plea did not preclude Herrera "from relitigating an issue in a subsequent criminal proceeding." *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1243 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889

(3d Cir. 1994) (rejecting issue preclusion for an element of the crime).

To convict Herrera, Wyoming had to prove the elements of the charged crimes beyond a reasonable doubt. Wyoming proved that (1) "on or about the 18th of January, 2014;" (2) "in Sheridan County, Wyoming;" (3) "the defendant, Clayvin Herrera;" (4) "did knowingly take;" (5) "an antlered elk;" (6) "during a closed season." (R.1412); Wyo. Stat. Ann. § 23-3-102(d). For the second charge, the State proved that (1) "on or about the 18th day of January, 2014;" (2) "in Sheridan County, Wyoming;" (3) "the defendant, Clayvin Herrera;" (4) "aided the knowing taking;" (5) "of an antlered elk;" (6) "during a closed season." (R.1413); Wyo. Stat. Ann. § 23-6-205(a).

In Wyoming, defendants have the burden of production to present a prima facie case for an affirmative defense. *Duckett v. State*, 966 P.2d 941, 948 (Wyo. 1998). Like other "circumstances of justification, excuse, or alleviation," a tribal hunting right is an affirmative defense. *Patterson v. New York*, 432 U.S. 197, 202 (1977). "Proof [beyond a reasonable doubt] of the non-existence" of an affirmative defense by the government "has never been constitutionally required." *Id.* at 210. When Herrera asserted a tribal hunting right, he stepped into the shoes of the Crow Tribe, the sovereign who negotiated the treaty with the United States. *Antoine v. Washington*, 420 U.S. 194, 205 (1975); *United States v. Dion*, 476 U.S. 734, 738 n.4 (1986). At its heart, Herrera's claim of a treaty right is a claim of federal pre-emption that has no relationship to the

crime charged or the State's burden of proof. There is nothing constitutionally dubious about the conclusion that, if the Crow Tribe cannot assert a treaty hunting right against Wyoming because of preclusion, then its members cannot either.

### 2. The Crow Tribe is precluded from challenging the Tenth Circuit's decision that the Bighorn National Forest is occupied.

Herrera argues the Tenth Circuit's holding that Bighorn National Forest is occupied for purposes of the Crow Treaty does not bind either the Tribe or himself. He argues the court denied the Crow Tribe a "full and fair opportunity" to litigate the issue and that an "alternative holding" has no preclusive effect. (Pet.Br.50-53). Herrera has not accurately recounted the *Repsis* litigation, and he cannot avoid preclusion by attacking the Tenth Circuit.

The Crow Tribe had ample opportunity in *Repsis* to dispute whether the Bighorn National Forest was occupied. Before the district court, Wyoming argued the Bighorn National Forest was occupied because, in part, "Congress passed numerous acts establishing and regulating federal lands including the Big Horn National Forest." Response Brief of Defendants at 7-8, *Repsis* App., Vol. II at 381-82. Wyoming renewed this argument on appeal from summary judgment, making it far from a "bolt from the blue." *Compare* Brief of Appellee 20-29, *Repsis*, 73 F.3d 982 (No. 94-8097) *with*

(Pet.Br.53-54). And, as Herrera concedes, the Tribe addressed the issue in its reply. (Pet.Br.53-54). Moreover, "[t]he values of preclusion would be destroyed if proof of the quality of the decision were required of the party asserting preclusion or permitted to the party opposing it." 18 Charles Wright et al., *Federal Practice & Procedure* § 4423 (3d ed. 2016).

Herrera's final argument against preclusion is that *Repsis*'s ruling that the Bighorn National Forest was "occupied" is an alternative holding. He cites another comment from the Restatement (Second) of Judgments that, if a "judgment by a court of first instance" relies on "determinations of two issues" that independently support the result, then the judgment is not preclusive on either issue. (Pet.Br.50 (citing Restatement (Second) of Judgments § 27 cmt. i)).

This Court has never adopted the position urged by the Restatement; its longstanding rule has been the opposite. "[W]here there are two grounds . . . each is the judgment of the court and of equal validity with the other." *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924). More fundamentally, Herrera's argument conflates the *Repsis* judgment—the basis for issue preclusion—with the *Repsis* reasoning. "With issue preclusion, it is the prior judgment that matters, not the court's opinion explaining the judgment." 18 *Moore's Federal Practice (Civil)* § 132.03, Lexis (database updated September 2018). *Repsis* held that tribal members must follow Wyoming law in the Bighorn National Forest because it is not "unoccupied

land[] of the United States" under the Crow Treaty. *Repsis* provided two explanations for this judgment: (1) land belonging to the United States ceased to be "unoccupied" when Wyoming became a state; and (2) "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Repsis*, 73 F.3d at 993. These were two explanations for the same ruling, not different judgments.

The courts have interpreted the Crow Treaty already, and the judgment is final. This Court's inquiry should stop here, and it should affirm the respect for finality demonstrated by the Wyoming courts.

## II. The Treaty with the Crows does not grant tribal members the right to hunt in the Bighorn National Forest in Wyoming.

Herrera's claimed treaty hunting right should be resolved as the Wyoming courts did: through issue preclusion. If this Court reaches the merits of the question presented, it should affirm the decision it reached 122 years ago in *Race Horse* when examining identical treaty language—the off-reservation treaty right was "not intended to survive Wyoming's statehood." *Mille Lacs*, 526 U.S. at 206. This conclusion is not only entitled to respect as *stare decisis*, it is entitled to respect because it is correct.

Herrera argues the Crow Tribe thought that land could only be occupied by the "actual, physical presence of non-Indian settlers." (Pet.Br.34-35). This interpretation is contrary to the treaty's text, ignores

its historical context, and is inconsistent with the behavior of the Tribe and the United States.

### A. Article 4 provided authority for the Crow Tribe to seek game outside the reservation boundaries only until non-Indians began to occupy the wilderness surrounding the reservation.

Indian treaties are "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Treaty language matters, however, and a court cannot disregard "the obvious, palpable meaning of the words of an Indian treaty" because "in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians." *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900). Courts must follow treaty language "that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims." *Or. Dep't of Fish and Wildlife v. Klamath Indians Tribe*, 473 U.S. 753, 774 (1993).

Interpretation requires the Court to examine the text, the treaty's historical context, and the understanding of the parties as reflected in the treaty's implementation. Each of these inquiries demonstrates that the Crow Tribe's off-reservation hunting right has expired. The text of Article 4, when read as a whole, provides only for a limited right. When reading the

treaty in its historical context—a time when the United States sought to sequester tribes from incoming settlements and allow a transition to agriculture—the temporary nature of the hunting right becomes evident. Finally, post-ratification implementation of the Crow Treaty indicates that both parties believed the off-reservation hunting right ended around the time of Wyoming statehood. Statehood was not, as Herrera suggests, a legal event that abrogated the off-reservation hunting right. Wyoming statehood represented a moment when all concerned could agree that the off-reservation hunting right had expired as envisioned by the 1868 Treaty.

### 1. The text of Article 4 of the Crow Treaty demonstrates that the Tribe's hunting right is limited to areas of wilderness before the arrival of non-Indians.

The text of Article 4 demonstrates that the Tribe's off-reservation hunting right is limited to the territorial wilderness. While the treaty phrase "unoccupied lands of the United States" could be read more broadly, those words "cannot be considered alone, but must be construed with reference to the context in which they are found." *Race Horse*, 163 U.S. at 508.

In the 19th century, unoccupied lands were not simply vacant lands; they were lands that could become occupied. *See, e.g.*, *Hutton v. Frisbie*, 37 Cal. 475, 486 (Cal. 1869) (Acts to pre-empt title derived

from Mexican government "were intended to give those who were pioneers in the unsettled wilds of the public domain the first right to purchase the *unoccupied lands* which they have had the courage and hardihood to settle . . . ") (emphasis added).

The "unoccupied lands of the United States" have a more common description: lands in "the public domain." "The public domain was the land owned by the Government, mostly in the West, that was available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." *Hagen v. Utah*, 510 U.S. 399, 412 (1994). Public domain land could be settled by private parties, but "[f]rom an early period in the history of the government it was the practice of the President to order, from time to time, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Id.* (internal punctuation omitted). Reservations from the public domain served various purposes, including "Indian settlement, bird preservation, and military installations." *Id.*

The justices on the *Race Horse* Court understood this meaning. The Court interpreted the phrase to mean "lands owned by the United States, and the title to or occupancy of which had not been disposed of." 163 U.S. at 508. *See also id.* at 509-10 (Court refers to "unoccupied public land of the United States").

In order for the other words in Article 4 to have meaning, however, they must be read to limit the off-reservation hunting right. The right to hunt on

unoccupied lands exists only "so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 16 Stat. 50.[8]

Hunting districts in the Treaty were not simply "places where game was to be found" or else the Treaty would not refer to "peace on the borders" of the districts. 163 U.S. at 508. Peace "among whites and Indians" on the "borders" of the hunting districts was similarly irrelevant if homesteaders had already arrived within the territory and were "no longer beyond the borders of the white settlements." *Id.* The best reading of Article 4 as a whole, then, is that the "unoccupied lands of the United States" are "lands of that character embraced within what the treaty denominates as hunting districts." *Id.*[9]

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[8] In *Repsis*, Wyoming argued that even if the hunting right continued after statehood, the game was gone, and the treaty does not permit tribal members to hunt a new resource that exists only through State investment. *Repsis* App., Vol. I at 265, 271-72 (demonstrating no viable population of elk existed in the Bighorn Mountains by 1909 and recovery came through Wyoming's actions). Wyoming also asserted that laches prevents the Tribe from reviving a hunting right it abandoned 100 years ago. *Id.* at 176. Because Wyoming prevailed on other grounds below, these arguments are not before this Court. Wyoming will raise these objections on remand, if needed.

[9] Interestingly, the Treaty does not limit Crow hunters to "unoccupied lands" within a specific hunting district identified for the Crow Tribe in the 1851 Treaty. Article 4 refers to "borders of the hunting districts" in the plural. This is unsurprising, given that the tribes that signed the 1851 Treaty did not cede territory to create the hunting districts, either to the United States or to one another. Treaty of Fort Laramie, Art. 5 (1851) (found in 2

The term "hunting districts" describes lands as they were at the time the Treaty was negotiated. "When in 1868 the treaty was framed, the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation." 163 U.S. at 508. The hunting districts were "wilderness" that had not yet seen the "march of advancing civilization." *Id.*

Unlike "unoccupied lands," the term "hunting districts" was not in common use; it appears only in the 1851 Treaty of Fort Laramie. In that document, hunting districts are the labels for areas within Indian Territory, described so travelers on the Oregon Trail could know which tribal land they crossed and the Army could hold specific tribes accountable for predation. *Montana II*, 450 U.S. at 557-58. The reference to hunting districts in the 1851 Treaty was not a grant of authority or title to the signatory tribes; "the 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories." *Id.* at 553. *See also United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 349 (1940) (noting the Court has repeatedly held 1851 lands "were Indian country, subject only to the Indians' right of occupancy").

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Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-95 (1904)) (Tribes "do not hereby abandon or prejudice any rights of claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described").

"Hunting districts" were not simply "places where game was to be found," but reflected territory "beyond the borders of the white settlements." *Race Horse*, 163 U.S. at 508. Therefore, when Article 4 provided that tribal members could hunt on unoccupied lands so long as peace prevailed on the borders of the hunting districts, the question of whether such lands remained unoccupied depended on whether the lands were beyond the borders of white settlements, not on whether, as Herrera argues, such lands lacked physical improvements.

### 2. Wyoming statehood did not abrogate the Tribe's hunting right; it reflected congressional recognition that the land identified in 1851 as "hunting districts" had permanently transformed.

The interaction of the phrase "hunting districts" and the "unoccupied lands of the United States" must also be understood in the historical context of reservation policy in the 1860s.

The "very object" of the Crow Treaty was to confine tribal members to a reservation separate from "the new settlements as they advanced." *Race Horse*, 163 U.S. at 509. Reservations were intended to "keep distance and peace between Indians and non-Indians." William C. Canby, Jr., *American Indian Law in a Nutshell* 21 (6th ed. 2015). When the Great Peace Commission convened in the late 1860s, the "principal cause of complaint" of the Indian tribes was "the fact

that the whites are invading their territory, cutting roads wherever they please, running railroads without stint, and building forts and filling them with soldiers, thereby driving all game from the country and depriving the Indians of the means of living." *Indian Peace Commission*, N.Y. Times, Sept. 29, 1867, at 4.

The transition to reservation life was particularly important for Plains Indians, who would perish after the buffalo disappeared if they did not adopt an agricultural lifestyle. Reservation policy did not envision that a tribal member could continue to "seek out every portion of unoccupied government land and there exercise the right of hunting" even if that parcel of land was in "already established States." *Race Horse*, 163 U.S. at 509. Such travel delayed the development of an agrarian lifestyle and magnified the potential for conflict, even on land that was still in the public domain. This is because, throughout western expansion, non-Indians raised livestock not just on their homesteads but on all nearby unoccupied land. *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (recognizing "an implied license, growing out of the custom of nearly a hundred years" to graze lands in the public domain "especially those in which the native grasses are adapted to the growth and fattening of domestic animals").[10]

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[10] The *Race Horse* litigants presented this concern to the Court, noting Race Horse hunted on land that was "used by the settlers as a range for cattle, and was within election and school districts of the State of Wyoming." 163 U.S. at 507. The Court

If the phrase "unoccupied lands of the United States" encompassed all land in the public domain anywhere, then the Treaty did not create the separation needed "to protect [tribal] rights and to preserve for [each Indian] a home where his tribal relations might be enjoyed under the shelter of the authority of the United States." *Race Horse*, 163 U.S. at 509. Travel off-reservation created danger, as incoming settlers seized "on any off-reservation hunting expeditions as evidence of the Indians' hostile intent." Hoxie, *Parading* 18.

The *Race Horse* Court understood reservation policy, in the 19th century, was a policy of separation. The Court also understood that the words of Article 4 created only a temporary right to hunt off-reservation which would terminate with the settlement of the West.

### B. The historical implementation of the Crow Treaty indicates that the off-reservation right to hunt ended at the time of Wyoming statehood.

Shortly after signing the 1868 Treaty, the United States explained that the Crow Tribe's off-reservation right was not available "where there are too many whites." *Annual Report of the Commissioner of Indian Affairs for 1873* at 503. "[T]he march of advancing civilization foreshadowed the fact that the wilderness,

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concluded that the actual use of the land was not relevant to the interpretation of the treaty right it adopted.

which lay on all sides of the point selected for the reservation," would soon be "occupied and settled." *Race Horse*, 163 U.S. at 508-09.

This march of civilization ended at statehood. By the mid-1870s, the buffalo were gone. In 1880, Indian Department regulations instructed Indian agents to inform tribal members that "they must confine their movements wholly within the limits of their respective reservations, that under no pretext must they leave the same without a special permit." Section 235 *Ins.* 1880 (as published in *Regulations of the Indian Department* § 492 (1884)).[11] The United States Army forced Crow Chief Crazy Head to return to the reservation when he sought to hunt elsewhere in 1883. The United States relocated the Crow Tribe to agricultural flatland in 1884. In 1886, the Crow ceased off-reservation hunting. By the time Congress granted statehood to Wyoming (1890) and Montana (1889) and Idaho (1890), all parties understood that the time for hunting had passed.

The *Race Horse* Court's conclusion that the hunting right had expired reflects the 19th century understanding of not just the *law* of statehood but what statehood represented. "[C]entral to the original conception of the territorial system" was the idea that

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[11] The 1904 Regulations of the Indian Office are even more clear about the places Indians may not travel: tribal members "will not be allowed to roam away from their reservations without any specific object in view, nor will they be allowed to *trespass upon the public domain*." *Regulations of the Indian Office* § 585 (1904) (emphasis added).

early settlers would, through territorial government "achieve self-government in a developing political community that eventually would be welcomed into the Union." Peter S. Onuf, "Territories and Statehood" (*Encyclopedia of American Political History* 1283, 1284 (1984)). Political leaders saw early settlers as "uninformed, and perhaps licentious people" whose "routine defiance of state and federal land laws" was but one disagreeable aspect of the character needed to settle the rough frontier. *Id.* at 1283. Statehood, in contrast, was not just a legal act; it was congressional recognition that these individuals no longer held sway.

This was the moment when civilization arrived. It is also, then, the logical time when hunting districts ceased and territory came "within the authority and jurisdiction of a State." *Race Horse*, 163 U.S. at 509; *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 927 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999) ("The standard of when 'unoccupied' lands become 'occupied' is certainly vague, and could logically include the grant of sovereignty to a newly formed state.").[12]

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[12] The statutes providing for land sales by the Crow Tribe in 1891 and 1904 do not affect the analysis. While each statute contains a savings clause that these later acts do not alter the tribe's treaty rights, no party argues that the land sales statutes affected the hunting right as a legal matter. Herrera's argument "rests on the assumption that there was a perpetual right conveyed by the treaty," and this Court rejected that conclusion. *Race Horse*, 163 U.S. at 515.

### C. The Tribe understood land could be "occupied" without physical presence.

Herrera offers an interpretation of "unoccupied lands of the United States" that no member of the *Race Horse* Court, no court ever, has adopted. Herrera agrees that the tribal right to hunt does not exist on land where "the whites" have "settled." (Pet.Br.34). He appears to concede that no right to hunt exists on private land at all, even if the owners are absent at a specific moment. (*Id.*) (noting the "tracts of land" where "the whites" eventually settled "would become occupied").[13] But Herrera argues the Crow Tribe would not have understood land was occupied without "actual, physical presence of non-Indian settlers." (Pet.Br.34-35).

Herrera's interpretation is incorrect. The Treaty with the Crows demonstrates that the Tribe understood "occupation" without physical presence. Article 2 reserved land for "the absolute and undisturbed use and occupation of the Indians herein named." 15 Stat. at 650. This phrase means "for all practical purposes, the tribe owned the land" and "no beneficial interest" other than "naked fee" was held by the United States. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938). This phrase grants the Crow Tribe "the implicit power to exclude others from the

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[13] The *Race Horse* Court described the treaty hunting right as "temporary and precarious" not simply because it could expire; the right was temporary and precarious because its application in any particular location "was to cease whenever the United States parted merely with the title to any of its lands." 163 U.S. at 515.

reservation." *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993).

Both the Crow and the United States understood the importance of the power to exclude. The 1868 Treaty reserved eight million acres, or 12,500 square miles, for the exclusive use and occupation of approximately 2,000 people. Joe Medicine Crow, *From the Heart of Crow Country* 12, 14 (1992) (noting smallpox had lowered Crow population from 8,000 in the 1830s to 2,000 by 1870). For perspective, the State of Maryland contains about six million acres.

"Under the treaty a relatively few Indians were to 'occupy' millions of acres of land within the meaning of the treaty, which suggests that the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an 'unoccupied' to an occupied status." *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985) (construing identical language in the Shoshone-Bannock Treaty). Tribal members knew that this grant of "exclusive use and occupation" meant that "no persons, except a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved" without the Tribe's permission. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 486 (1937).

If the sheer size of the Crow Reservation does not demonstrate that "physical presence" was not required for occupation, the Tribe had experience with the

behavior of the United States. Four years after the 1868 Treaty, the United States created Yellowstone National Park, preventing its settlement and "proceeding immediately to forbid hunting in a large portion of the Territory" of the hunting district without establishing an actual physical presence throughout that place. *Race Horse*, 163 U.S. at 510.[14]

Herrera's argument about physical presence also misunderstands the nature of settlement in the Rocky Mountain West. The area lacks abundant moisture and fertile soil. "[P]ublic lands in the West" were, as President Roosevelt concluded, "suitable chiefly or only for grazing." Message of Theodore Roosevelt to the Senate and House of Representatives (December 2, 1902) (15 *A Compilation of the Messages and Papers of the Presidents* 6725 (1909)). "[I]n the grazing region the man who corresponds to the homesteader may be unable to settle permanently if only allowed to use the

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[14] The legislative history cited by the United States is inconclusive. (Br. of United States at 25-26). Senator Harlan noted the treaty was "expected to induce the Indians to settle down and engage in pastoral and agricultural pursuits." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Nevertheless, he explained, "There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements." *Id.* Yellowstone was not settled, but its creation reflected an immediate congressional decision that not all lands needed "settlements" to lie beyond the off-reservation right. Moreover, when Senator Harlan qualified his understanding with "I think," he not only indicated to his colleagues that he was uncertain about the Treaty's meaning, but he also showed why "[s]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier Congress.'" *Jones v. United States*, 526 U.S. 227, 238 (1999).

same amount of pasture land that his brother, the homesteader, is allowed to use of arable land. One hundred and sixty acres of fairly rich and well-watered soil, or a much smaller amount of irrigated land, may keep a family in plenty, whereas no one could get a living from one hundred and sixty acres of dry pasture land capable of supporting at the outside only one head of cattle to every ten acres." *Id.*

Wyoming's heavy reliance on cattle and sheep ranching further demonstrates why Herrera's focus on "actual, physical presence" is incorrect: tribal leaders understood that land with cattle was occupied, but land with cattle was often in the public domain.

In 1870, the Wyoming Territory had 8,143 cattle. T.A. Larson, *History of Wyoming* 165 (1965). Fifteen years later, Wyoming's Territorial Governor reported that ranching was ninety-percent of the state's economy, and its 894,788 cattle "roam in every valley and drink from every stream in the territory." *Id.* at 167. The Crow long understood that cattle would appear when the bison disappeared and that cattle meant the settlers had arrived. *Cutler*, 708 P.2d at 859 (cattle are an "indicium of occupancy"). *See* Frank Linderman, *Plenty-Coups, Chief of the Crows* 40-41 (2d ed. 2002) (Crow Chief Yellow-Bear told Chief Plenty-Coups that in Plenty-Coups' lifetime, "the buffalo will go away forever" "and that in their place on the plains will come the bulls and cows and calves of the white men.").

Herrera's theory that tribal members could hunt anywhere they could not discern actual, physical presence—unless, of course, the land was private property—would have created conflict. Private property with an absent owner could be off-limits, and land with cattle in the public domain could appear occupied. Herrera's theory would have required tribal members to understand survey lines and land patents in order to discern the true status of land they hunted, and this cannot be the intended meaning of either the United States or the Crow Tribe.

### D. This Court should honor *stare decisis* by maintaining its current interpretation of the phrase "unoccupied lands of the United States."

Under the doctrine of *stare decisis*, once this Court has fully considered and decided an issue, it is not reexamined again and again. Wyoming and its citizens have relied on the interpretation from *Race Horse* for 122 years, and *stare decisis* "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision[.]" *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).[15]

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[15] Herrera and the United States are somewhat vague as to whether private land is outside of his tribal hunting right. This means that a ruling in Herrera's favor will also dramatically disrupt the settled expectations of private property owners who for more than 100 years have believed they have the right to exclude others from hunting or crossing their property. Such a

In 1896, this Court held that the right to hunt on "unoccupied lands of the United States" in Wyoming was "not intended to survive statehood." *Mille Lacs*, 526 U.S. at 206. "This Court does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). "Considerations of *stare decisis* have special force in the area of statutory interpretation" because Congress can override the Court's decisions with contrary legislation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

In 1900, there were no elk on the eastern slope of the Bighorn Mountains. Calvin King, *Reestablishing the Elk in the Bighorn Mountains* 1 (1963). (R.519). In 1909, Wyoming began a four-decade conservation effort to reintroduce elk in the Bighorn Mountains, moving captured elk by sleigh over Teton Pass from Jackson Hole, Wyoming, into Idaho, by wagon to a nearby railroad station, and then by railroad car to the Bighorn Mountains. *Id.* at 8-18 (R.523-28). With this re-introduction, with the re-introduction of Bighorn Sheep, and with other efforts at species preservation, Wyoming has developed and implemented a complex scheme of wildlife management and conservation in the Bighorn Mountains, and it has earned public support (and investment) with the understanding that Wyoming's authority is unquestioned. Moreover, Wyoming's management not only protects elk, but it

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holding also arguably conflicts with *Montana II*, which concluded that the Crow Tribe had no demonstrated interest in regulating hunting and fishing on privately owned land *within* the reservation. 450 U.S. at 565-67.

uses this species to provide funding to conserve hundreds of other animals, from the grizzly bear to the sage grouse to the black-footed ferret. *See 2017 State Wildlife Action Plan* (https://bit.ly/2pRaS6Z).

The members of the *Race Horse* Court, having lived through the three decades of western expansion after the Civil War, were well-positioned to interpret the language of Article 4. They had watched the buffalo disappear from the Great Plains, leaving nomadic tribes like the Crow Indians to adapt or vanish. The Court understood how the phrases "unoccupied lands of the United States" and "hunting districts" interacted with the United States' Reservation Policy because these were the current events of daily life. This Court should adopt their conclusion that Article 4's "temporary and precarious" off-reservation hunting right has expired, because their analysis was informed by more legal and historical context than the parties here could ever present. And it is correct.

## III. By withdrawing the Bighorn National Forest from the public domain, the United States occupied that land within the meaning of the Crow Treaty.

Wyoming does not argue that President Cleveland "abrogat[ed] Indian treaty rights when creating" the national forest. (Pet.Br.39). When he declared a national forest reserve in the Bighorn Mountains, President Cleveland removed these lands from the

public domain. When lands are no longer in the public domain, the Treaty itself says they are no longer within the ambit of the off-reservation hunting right.

### A. President Cleveland's proclamation changed the character of the Bighorn National Forest lands.

In the 19th century and now, the federal government can occupy land through its exercise of dominion and control, and creation of the national forest was exercise of the United States' "power of reservation" to remove land from settlement because "the public interest would be served by withdrawing or reserving parts of the public domain." *Hagen*, 510 U.S. at 412.[16]

The Forest Reserve Act provided authority to "set apart and reserve" in "any State or Territory having public land bearing forest" the land "wholly or in part covered with timber" as a "public reservation." Timber Culture Repeal (Forest Reserve Act), ch. 561, § 24, 26 Stat. 1095 (1891). President Cleveland proclaimed the Bighorn National Forest was "reserved from entry or settlement and set apart as a Public Reservation." Proclamation No. 30, Grover Cleveland (Feb. 22, 1897), 29 Stat. 909.

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[16] If this Court concludes the Bighorn National Forest is unoccupied as a matter of law, the United States agrees Wyoming is entitled to a remand to offer factual evidence of occupation. (Br. of United States at 29).

The declaration of a national forest is no different than creation of a military reservation or an Indian reservation. The United States orders that land in the public domain "be reserved from sale and set apart for public uses." *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868). Tribal leaders had visited military outposts in 1867, so they "undoubtedly understood that a governmental unit could 'occupy' lands within the meaning of the treaty." *Cutler*, 708 P.2d at 857. The Crow Tribe's occupation of its reservation was similar; the Tribe did not live everywhere on the land but it had the right to prevent entry and settlement by others.

As *Race Horse* noted, the creation of Yellowstone "forbid hunting in a large portion of the Territory" of a hunting district. 163 U.S. at 510. That statute used words similar to those in President Cleveland's proclamation: the land was "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States and set apart as a public park or pleasuring-ground." ch. 24, § 1, 17 Stat. 32 (1872).

At the time, President Cleveland's declaration of numerous national forests was controversial. In response, Congress enacted the Organic Act of 1897, and this statute also reflects the understanding that the forest had been reserved and the sovereign would henceforth manage the forest as its own private property. ch. 2, 30 Stat. 11 (1897). The Organic Act suspended President Cleveland's designations and the "lands embraced therein" were "restored to the public domain." 30 Stat. at 34. If the forest was not "otherwise disposed of" within a year after enactment of the

Organic Act, and the Bighorn National Forest was not, then the President's designation became effective again. *Id.* The act also authorized "such rules and regulations" as "will ensure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction." 30 Stat. at 35.

### B. The United States' proprietary regulation of the Bighorn National Forest demonstrates its occupation of the land.

Wyoming does not dispute that the United States, in its proprietary capacity, has "plenary power" to decide who hunts on its land. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). It has done so here, and Herrera's actions violated the restrictions on hunting imposed by the United States as landowner. The United States itself regulates hunting in the national forests, and Herrera's actions violated these commands.

Since 1941, the United States has banned hunting in a national forest without a permit from the Forest Supervisor. 36 C.F.R. § 241.3(b). The same rule directs the Forest Service to enter into cooperative agreements with states for wildlife management (*i.e.*, hunting). 36 C.F.R. § 241.2; Master Memorandum of Agreement between the Forest Service and Wyoming Game and Fish Commission, *Repsis* App., Vol. I at 248-60. (cooperative agreement for Wyoming to manage

wildlife in the national forests and containing no reference whatsoever to tribal hunting rights).

Other federal restrictions on hunting in the national forests date back even earlier. In the first appropriation to implement the Organic Act, Congress ordered that federal employees "shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game[.]" Appropriations Act of 1899, ch. 424, 30 Stat. 1074, 1095 (1899); *see United States v. New Mexico*, 438 U.S. 696, 722 (1978) (discussing history); 16 U.S.C. § 553.

In its brief, the United States identifies another regulation that limits tribal hunting: the prohibition against discharging firearms near a residence. The United States does not, however, explain why that regulation applies to Herrera, while the prohibition against hunting without a permit does not. (Br. of United States at 28 (citing 36 C.F.R. § 261.10(d)(1))). The explanation cannot be that the regulations have different underlying authority, as both rely on proprietary authority under the Organic Act. Regulations for the Administration and Enforcement of Laws Relating to Wildlife, 6 Fed. Reg. 1987 (Apr. 17, 1941); National Forest System Prohibitions, 42 Fed. Reg. 2956, 2957 (Jan. 14, 1977).

Moreover, neither restriction explicitly references an Indian treaty right, so the different application cannot derive from an unspecified "clear statement"

requirement. The United States' suggestion that one restriction is within its power necessarily implies that the other restriction, which reinforces the illegality of Herrera's conduct, also applies here.

The United States does not need to alter the federal common law of issue preclusion, overcome *stare decisis*, and revive a defunct treaty right to accomplish the result it seeks here. This is federal property, and the United States decides who may enter and what they may do.

### C. The Crow Tribe understood the Bighorn National Forest was occupied.

When President Cleveland acted, the Bighorn National Forest looked nothing like the "aboriginal hunting grounds" Herrera invokes. (Pet.Br.10). By the 1890s, the Homestead Act's vision of small farms had given way to the most exploitive, scarring extraction of natural resources the Bighorn Mountains had ever seen. "[G]ame in the Big Horn Basin was practically extinct in 1900[.]" King, *History of Wildlife* at 19. The animals had been killed for food by men living in logging camps and mining camps. By 1899, in the Bighorn National Forest, "[n]early all has been burned, much of it recently, and a large part has been subjected to repeated fires." *Annual Report of the United States Geological Survey for 1898*, Part 5a: Forest Reserves at 168 (1899). "A considerable proportion of its area consists of open parks from which the timber has evidently been completely driven out." *Id.*; *see also id.*

at 186 ("Less than 10 per cent of the area of the reserve bears timber large enough for present use[.]"); *id.* at 179-81 (noting multiple logging mills); *id.* at 181-83 (noting mining claims for gold and copper, and stating, "In these localities and many others every acre for miles around has been staked off in claims."); *id.* at 183-85 (400,000-450,000 head of sheep grazed there).

The Crow Tribe would have understood the Bighorn Mountains were occupied even before President Cleveland's declaration, which removed any doubt.

### D. The Forest Reserve Act "savings clause" cited by Herrera is irrelevant.

Herrera notes that the Forest Reserve Act states that Indian treaty rights are not changed, repealed, or modified as a result of the Act. (Pet.Br.39 ("But Congress also made crystal clear that 'nothing in this act shall change, repeal, or modify any . . . treaties made with Indian tribes.'")). The full provision has a different meaning: "nothing in this act shall change, repeal, or modify any agreements or treaties with Indian tribes *for disposal of their lands* . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements[.]" *See* ch. 561, § 10, 26 Stat. at 1099 (1891) (emphasis added). The provision says nothing about treaty hunting rights; it exists because immediately before the savings clause in section 10, the Forest Reserve Act stated "no public lands of the United States, except abandoned military reservations . . . shall be sold at

public sale." ch. 561 § 9, 26 Stat. at 1099. Without the savings clause, the United States could not fulfill existing agreements to sell tribal land, because it still had the legal title.

## CONCLUSION

Since *Race Horse*, Wyoming has relied upon this Court's holding; it is Wyoming's responsibility to manage wildlife in trust for all. Wyoming has reintroduced wildlife where there was none, including within the Bighorn National Forest.

The United States suggests the parties return to the lower courts to litigate whether conservation necessity justifies Wyoming's regulation. Wyoming is confident of its wildlife management, but additional costly litigation is not necessary. This Court should preclude Herrera from relitigating the exact treaty provision that his sovereign—the Crow Tribe—litigated and lost. Collateral attacks undermine the expectations of litigants and, more generally, faith in the judicial system.

If this Court nonetheless considers Herrera's new interpretation of Article 4 of the Crow Treaty, it should conclude that the text, the historic context of the treaty, and the post-ratification conduct of the parties all indicate that Article 4 was a temporary measure. Article 4 expired when Wyoming gained statehood and the hunting districts vanished. If this Court concludes that the right persists, then it should hold that

creation of the Bighorn National Forest occupied that land as a matter of law. Herrera's conviction should be affirmed.

Respectfully submitted,

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